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No. 94-1387

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
*Petitioners*

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
*Respondents*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF *AMICUS CURIAE* OF THE NATIONAL MARINE MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit incorrectly decided that the damages, if any, available to survivors of a victim of a fatal recreational boating accident which occurred in navigable territorial waters are determined under state law rather than according to the general federal maritime cause of action created by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

2. If the question presented above is decided affirmatively, petitioners also request that this Court decide the questions originally certified to the Third Circuit, to wit, whether, pursuant to the general maritime death action, respondents may recover: (1) damages for loss of society; (2) damages for lost future earnings; and/or (3) punitive damages.

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## BRIEF *AMICUS CURIAE* OF THE NATIONAL MARINE MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS

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The National Marine Manufacturers Association ("NMMA") respectfully urges this Court to grant Yamaha Motor Corporation, U.S.A. and Yamaha Motor Company, Ltd.'s Petition for Writ of Certiorari and to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit (the "Court of Appeals").*

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* Petitioners and Respondents have consented in writing to the NMMA filing this brief. Letters stating their consents have been filed with the Clerk of the Supreme Court.

## NATURE OF THE NMMA'S INTEREST

The NMMA is an international, not-for-profit association of marine product manufacturers, who design, produce, and sell recreational boats, engines, parts, and other equipment. The NMMA was founded in 1906 and, today, has approximately 1,500 members. NMMA members produce approximately 80 percent of the marine products used by recreational boaters and fishermen in the United States. The recreational boating industry itself employs nearly 400,000 people in the United States with annual sales in excess of 11 billion dollars.

The fundamental purpose of the NMMA is to promote and encourage recreational boating and the recreational boating industry. The NMMA offers its members and the recreational boating industry a broad spectrum of programs and services, including technical advice and services, statistical analyses, participation in and support of trade shows, advertising, improvements in and advocacy of safety, and assistance in the export of members' products and services. To further this purpose, the NMMA participates regularly in litigation, as a party and as *amicus curiae*, and in activities involving governmental relations as they relate to the recreational boating industry. In addition, the design of the products manufactured and sold by the members of the NMMA must conform to the regulations the Secretary of Transportation (United States Coast Guard) has promulgated under the Federal Boat Safety Act, 46 U.S.C. §§ 4301-11. Accordingly, the NMMA coordinates a certification program that assures consumers that all boats and equipment that satisfy the NMMA certification requirements also meet these mandatory federal regulations as well as other voluntary safety and engineering standards, such as those of the American Boat and Yacht Council.

The Petition for Writ of Certiorari before this Court presents the question whether the general maritime law or state law should govern wrongful death actions

brought by the survivors of recreational boaters who are killed in territorial waters. The NMMA and its members are regularly involved in litigation throughout the United States, in federal and state courts, arising out of the deaths of recreational boaters in territorial waters. Consequently, the NMMA has a vital interest in the resolution of this question and in the establishment and maintenance of a uniform general maritime law because its membership must comply with mandatory federal standards and is subject to lawsuits in every state.

## SUMMARY OF ARGUMENT

The Court of Appeals held that the law of state wrongful death and survival actions, not the general maritime law, governs the deaths of recreational boaters in territorial waters. The Court of Appeals' holding abandons this Court's opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which created a general maritime wrongful death action. Moreover, the Court of Appeals' decision conflicts with the overwhelming majority of federal courts of appeals and state supreme courts that have addressed similar cases. If left to stand, the Court of Appeals' holding will seriously impair the uniformity of maritime wrongful death remedies, thereby avoiding the consequences of this Court's recent decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

## ARGUMENT: REASONS FOR GRANTING WRIT OF CERTIORARI

### I. THE COURT OF APPEALS' DECISION MISINTERPRETS AND MISAPPLIES THIS COURT'S HOLDING IN *MORAGNE v. STATES MARINE LINES, INC.*

Before this Court's ruling in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), in 1970, the general maritime law afforded no wrongful death cause of action to the survivors of a person killed on either the high seas or in the territorial waters of the United States. *See*

*Miles v. Apex Marine Corp.*, 498 U.S. 19, 23 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212 (1986); *THE HARRISBURG*, 119 U.S. 199, 213-14 (1886). Instead, a decedent's survivors were left to seek recovery under state law. Such recovery was possible, however, only if state law specifically permitted it and, ordinarily, only if the death occurred within territorial waters. *Tallentire*, 477 U.S. at 212.

In 1920, Congress enacted two pieces of maritime legislation that significantly changed the face of wrongful death recovery under maritime law: the Jones Act, 46 U.S.C. § 688, and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68 (sometimes collectively the "1920 Acts"). The Jones Act provided the personal representative of a seaman killed in the course of employment a wrongful death action, based on negligence, against the seaman's employer. DOHSA created a similar right of recovery for the representative of anyone killed on the high seas. Unlike the Jones Act, DOHSA permitted actions based on unseaworthiness as well as negligence. *See Miles*, 498 U.S. at 25. As this Court later recognized, the Jones Act and DOHSA "established a policy in favor of maritime wrongful death recovery" and "a strong presumption in favor of a general maritime wrongful death action." *Id.* at 25.

Nevertheless, from 1920 to 1970, several serious gaps existed in the maritime law's wrongful death remedies. First, within territorial waters, the general maritime law provided a remedy for an unseaworthy vessel that injured an individual but not for one that caused the individual's death. *Miles*, 498 U.S. at 26; *Moragne*, 398 U.S. at 395. Second, DOHSA permitted recovery for a death on the high seas resulting from unseaworthiness, but the general maritime law did not allow such recovery for a similar death that occurred in territorial waters. *Miles*, 498 U.S. at 26; *Moragne*, 398 U.S. at 395. Lastly, a Jones Act seaman's survivors had no right of recovery if the seaman's death resulted from an unseaworthy condi-

tion. but the survivors of a longshoreman, a nonseaman, did where state law permitted recovery for unseaworthiness. *Miles*, 498 U.S. at 26; *Moragne*, 398 U.S. at 395-96. The anomalous results that this interplay between the 1920 Acts and state law produced caused "uncertainty and incongruity" in maritime law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621 (1978).

To fill these gaps, this Court recognized, for the first time in *Moragne*, a remedy for wrongful death under the general maritime law, overruling *THE HARRISBURG*. *Id.* *Moragne* involved the death of a longshoreman killed aboard a vessel in the territorial waters of Florida. The longshoreman's widow sued the owner of the vessel for the wrongful death of her husband and his pain and suffering, based upon both negligence and the unseaworthiness of the vessel. *Moragne*, 398 U.S. at 376. The vessel owner moved to dismiss the wrongful death claim premised on unseaworthiness, contending that maritime law did not permit recovery for a wrongful death within a state's territorial waters and Florida law did not recognize unseaworthiness as a basis of liability. *Id.* The district court dismissed the wrongful death-unseaworthiness claim, and, later, the court of appeals affirmed the district court's dismissal. *Id.* at 377.

This Court reversed the court of appeals' decision and, relying on the policies of uniformity inherent in the 1920 Acts and the general maritime law, fashioned a maritime wrongful death cause of action. *Miles*, 498 U.S. at 27. The *Moragne* Court reasoned that:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty

> law should be a "system of law coextensive with, and operating uniformly in, the whole country."

*Moragne*, 398 U.S. at 401-02 (citations omitted).

Nevertheless, the Court of Appeals held, in the present case, that the *Moragne* general maritime wrongful death remedy was not meant to preempt state wrongful death or survival actions. *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 639, 640 (3d Cir. 1994). In addition, the Court of Appeals determined that DOHSA "was affirmatively intended to preserve state wrongful death remedies for survivors of people killed in territorial waters." *Id.* at 642. Consequently, the Court of Appeals concluded that courts are free to apply state remedies to suits arising out of the deaths of nonseamen in territorial waters where "they do not conflict with whatever settled principles exist." *Id.* at 641.

The Court of Appeals' reasoning is, however, flawed. In *Moragne*, this Court expressly rejected the view that each state could supply its own remedy for deaths occurring in its territorial waters, which was the situation before the *Moragne* decision. Instead, the Court adopted a general maritime wrongful death remedy to promote the maritime goal of uniformity and noted that "[t]he incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case." *Moragne*, 398 U.S. at 401 n.15. Accordingly, the Court concluded that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Id.* at 401 n.15. In recent years, this Court has returned to this fundamental principle of uniformity. *See Miles*, 498 U.S. at 29-30, 37.

The courts of appeals have recognized that this Court's holding in *Moragne* eliminated the rationale for the enforcement of state remedies in admiralty and, therefore, that the *Moragne* wrongful death remedy precludes recognition of those state remedies. *See, e.g., Preston v.*

*Frantz*, 11 F.3d 357 (2d Cir. 1993) (per curiam) (general maritime law survival action precludes the application of state survival actions), *cert. dismissed*, —— U.S. ——, 115 S. Ct. 31 (1994); *Wahlstrom v. Kawasaki Heavy Inds., Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993) (*Moragne* wrongful death action precludes use of state wrongful death statutes), *cert. denied*, —— U.S. ——, 114 S. Ct. 1060 (1994); *Evich v. Morris*, 819 F.2d 256, 257-58 (9th Cir.) (*Moragne* precludes the use of state survival actions), *cert. denied*, 484 U.S. 914 (1987); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) (general maritime wrongful death action precludes applying state wrongful death statutes); *Matter of S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976) (same). The Court of Appeals' decision here is a radical departure from and seriously impairs the uniformity of maritime wrongful death remedies by returning to state law for maritime accidents occurring in territorial waters.

Moreover, the Court of Appeals' reliance on DOHSA is misplaced. While *Tallentire* addressed the effect of DOHSA on the application of state remedies, the Court's decision in that case did not consider *Moragne*'s impact on the use of state remedies. As both *Moragne* and *Tallentire* observed, when Congress enacted DOHSA in 1920, state law was the only law that could provide a remedy for a death suffered within state territorial waters. *Tallentire*, 477 U.S. at 212; *Moragne*, 398 U.S. at 393-94. As a result, in creating a federal statutory remedy for wrongful deaths on the high seas, Congress did not intend DOHSA to preempt those state laws that provided the only means of recovery for wrongful deaths in territorial waters in 1920. *See Miles*, 498 U.S. at 25; *Moragne*, 398 U.S. at 397-400. In contrast, this Court's holding fifty years later in *Moragne* obviated the need for resort to state wrongful death statutes by providing a wrongful death remedy under the general maritime law and thereby creating a uniform federal scheme for wrongful deaths in territorial waters as well as on the high

seas. *See Wahlstrom*, 4 F.3d at 1089; *Matter of S/S HELENA*, 529 F.2d at 753.

Thus, the *Moragne* wrongful death remedy controls the analysis the Court of Appeals employed.[1] Contrary to the Court of Appeals' suggestion, whether state law can provide the rule of decision in an admiralty case does not depend solely on whether the state law "conflicts" with substantive federal maritime principles. Instead, in an admiralty case, a court may look to state law only where no federal statute or general maritime law rule applies and, then, only if the state law does not "impair the uniformity and simplicity which is a basic principle of the federal admiralty law." *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981) (discussing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)).

Here, *Moragne* has provided a general maritime rule governing wrongful deaths in territorial waters that courts cannot simply circumvent by resort to state law. Although *Moragne* left open a number of questions regarding the cause of action it created, this Court has held that "[a]s *Moragne* itself implied, DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Higginbotham*, 436 U.S. at 624. In

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[1] Perhaps the most fundamental flaw in the Court of Appeals' decision is its attempt to use a "preemption" analysis in determining whether to apply maritime law. *Calhoun*, 40 F.3d at 627-30 ("Whether a state law may provide a rule of decision in an admiralty case depends on whether the state rule 'conflicts' with the substantive principles of federal admiralty law."). The determination of whether maritime law applies is *not* resolved, however, according to preemption principles, but rather through choice-of-law principles. Once a court, including a state court, determines that maritime law governs, the court must apply the entirety of the substantive principles of federal maritime law. *See Tallentire*, 477 U.S. at 222-23. The issue-by-issue preemption analysis adopted by the Court of Appeals completely defeats the policy of uniformity espoused in *Moragne*.

its rush to apply state law, the Court of Appeals appears to have lost sight of the role this Court intended the *Moragne* right of recovery to play in establishing a more uniform federal system of recovery for wrongful deaths that occur on the territorial waters and high seas.[2]

## II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S TREATMENT OF MARITIME JURISDICTION AND THE HOLDINGS OF A NUMBER OF OTHER COURTS OF APPEALS AND STATE SUPREME COURTS.

The Court of Appeals concluded that maritime law had not addressed the factual situation before it and, therefore, that state law should apply.[3] *See Calhoun*, 40 F.3d at 628 n.7 ("The correct analytic conclusion, we believe, is that admiralty law simply has not spoken to the factual situation of this case, and that state laws accordingly apply of their own force."), 629 n.8 ("we discern no maritime law governing the plaintiffs' wrongful death and survival actions and no federal interest whose uniformity would be unconstitutionally impaired by application of state law."). Further, the Court of Appeals held that federal admiralty law does not supplant state

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[2] The Court of Appeals' clear, but unspoken, goal appears to have been to evade this Court's holding in *Miles*. There, recognizing the fundamental principle of uniformity that is the hallmark of the general maritime law, this Court established the parameters of damages that may be awarded in a wrongful death action under the general maritime law. *See Miles*, 498 U.S. at 37.

[3] The Court of Appeals used the terms "recreational boaters" and "nonseamen" interchangeably, making it difficult to determine whether its holding concerns only recreational boaters or nonseamen in general. Regardless, the discussion in this section demonstrates that maritime law has addressed the question of recreational boaters, and this Court has indicated that the general maritime wrongful death action governs claims by the survivors of nonseamen. *See, e.g., Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974) (considering the application of the *Moragne* wrongful death remedy to the survivors of longshoremen).

wrongful death or survival statutes for "deaths of recreational boaters (non-seamen) within territorial waters." *Id.* at 638, 643. Contrary to the Court of Appeals' assumption, however, a number of courts have addressed the same, or similar, factual scenario, and the overwhelming majority of these courts have determined that the general maritime law, not state law, governs the remedies at issue.

### A. The Court Of Appeals' Decision Conflicts With This Court's Treatment Of Maritime Jurisdiction.

The Court of Appeals complained that the general maritime law had simply not addressed the question of recreational boating. Yet, on at least two occasions, this Court has made a point to include recreational boating within maritime jurisdiction. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Sisson v. Ruby*, 497 U.S. 358 (1990), this Court held that admiralty jurisdiction extends to recreational, and other noncommercial, boats. *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, —— U.S. ——, 115 S. Ct. 1043, 1053 (1995) (discussing *Foremost Insurance* and *Sisson*).[4] As even the Court of Appeals admitted, " '[w]ith admiralty jurisdiction comes the application of substantive admiralty law.' " *Calhoun*, 40 F.3d at 626-27 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)).

This Court's decisions in *Foremost Insurance* and *Sisson* evince an intent to bring recreational boating within the domain of maritime law. It makes little sense to suggest that this Court would have extended admiralty jurisdiction to recreational boating simply to apply state law to torts involving recreational boats. If the Court really intended state law to govern torts relating to recreational

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[4] Indeed, the Third Circuit itself has held that admiralty jurisdiction includes recreational boaters. *See Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602-03 (3d Cir. 1991).

boating, it would not have included recreational boating within admiralty jurisdiction. Instead, it would have been far simpler to leave recreational boating to the states and state law.

The Court of Appeals' suggestion that maritime law has not spoken to the subject of recreational boaters also ignores Congress' pronouncements in this area and the role of recreational boaters in today's maritime world. First, the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-11, grants the United States Coast Guard exclusive jurisdiction to regulate recreational boat design throughout the United States and expressly preempts the application of state law. Second, the federal rules of conduct on navigable waters, the Inland Navigational Rules Act of 1980, 33 U.S.C. §§ 2001-73, apply to "all vessels upon the inland waters of the United States" both commercial and noncommercial. Third, as discussed in greater detail below, DOHSA applies to deaths that occur on both commercial and noncommercial vessels on the high seas. Fourth, the Coast Guard estimates that currently over 20 million recreational boats travel the inland waters, ranging in size from under ten feet long to over 100 feet long and outnumbering commercial vessels on these waters. *See* UNITED STATES COAST GUARD, BOATING STATISTICS 1993 (Commandant Pub. P16754.7).

### B. The Court Of Appeals' Decision Conflicts With Holdings Of Other Courts Of Appeals In Similar Cases.

In *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, the Second Circuit confronted the precise factual situation considered in *Calhoun*. 4 F.3d at 1084. *Wahlstrom* involved the death of a seventeen-year-old boy who was killed when the rented Kawasaki Jet Ski he was operating collided with a power boat on a river in Connecticut. After the accident, his parents sued the manufacturer of the jet ski under Connecticut products liability and con-

sumer protection laws, seeking compensatory and punitive damages and attorneys' fees. *Id.* The manufacturer moved for summary judgment, arguing that federal maritime law governed the suit and barred the parents' recovery under state law. The district court granted the motion, and the parents appealed.

On appeal, the parents contended that maritime law did not preclude the application of state wrongful death statutes and, if maritime law did apply, the court should fashion the federal remedy using the state wrongful death principles. The Second Circuit rejected both of these arguments and held that federal maritime law alone governed the parents' claims *whether or not it conflicted with state law*. *Id.* at 1087-88. The Second Circuit reasoned that:

> In our view, the Supreme Court's creation in *Moragne* of a federal wrongful death action under general maritime law precludes the use of state wrongful death statutes in maritime claims. Without such preclusive effect, "the tensions and discrepancies" resulting from application of state remedial statutes could not be removed.

*Id.* at 1089. Accordingly, the court considered whether maritime law recognized the various elements of damages the parents sought in their wrongful death and survival actions. *See id.* at 1089-94. Importantly, in the present case, the Court of Appeals was aware of the *Wahlstrom* decision but considered it only briefly in a footnote. *Calhoun*, 40 F.3d at 639 n.30.

In *Kelly v. Panama Canal Commission*, the survivors of an army captain who was killed when the mast of his recreational boat struck hanging electrical wires sued the responsible governmental authority, seeking damages for the captain's pain and suffering and for loss of society and support to his minor child and wife. 26 F.3d 597, 599 (5th Cir. 1994). The captain's widow sued under

22 U.S.C. §§ 3772, 3776, which permit the recovery of damages for injuries occurring in areas outside of the Panama Canal locks and provide that courts are to apply the same law and rules of practice that would govern similar cases between a private party and the United States. The Fifth Circuit held that the general maritime law applied because it "governs virtually all non-statutory tort actions occurring on navigable waters" and limited the plaintiffs' recovery to pecuniary losses under the general maritime law. *Id.* at 601-02. *See also Walker v. Braus,* 995 F.2d 77 (5th Cir. 1993) (recognizing that the general maritime law applied to the loss of consortium claims of the survivors of an individual killed when a chartered crew boat collided with his recreational fishing boat).

Similarly, the Sixth and Ninth Circuits have also applied general maritime law to wrongful death actions brought by the survivors of recreational boaters killed in territorial waters. In *Anderson v. Whittaker Corporation,* the district court and the Sixth Circuit applied maritime law to the wrongful death claims of the survivors and representatives of boaters who drowned when their recreational boat capsized while crossing Lake Michigan. 692 F. Supp. 764 (W.D. Mich. 1988), *rev'd in part on other grounds,* 894 F.2d 804 (6th Cir. 1990). In *Sutton v. Earles,* the Ninth Circuit held that the general maritime law determined the government's duty to boaters who died when their pleasure boat allided with a Navy mooring buoy in Huntington Harbor. 26 F.3d 903, 911-12 (9th Cir. 1994). The Ninth Circuit awarded wrongful death damages to the boaters' survivors and representatives based upon general maritime law. *Id.* at 915-20.

### C. The Court Of Appeals' Decision Also Conflicts With Holdings Of State Supreme Courts In Similar Cases.[5]

In *Choat v. Kawasaki Motors Corporation*, an eighteen-year-old girl was killed when a jet ski, operated by another teenager, struck her in the head while she was lying on an inflatable float on a lake. 1994 A.M.C. 2626 (Ala. 1994). The girl's mother sued the jet ski manufacturer under Alabama law. The manufacturer moved for summary judgment, arguing that the mother's claims were subject to maritime jurisdiction and that maritime law did not recognize a nondependent's recovery for loss of society or punitive damages in a wrongful death action. The trial court granted the manufacturer's motion.

On appeal, the girl's mother contended that regardless of whether maritime law applied, the court should supplement substantive maritime law with the Alabama Wrongful Death Act. Relying on *Wahlstrom*, the Alabama Supreme Court held that federal maritime law applied to actions for wrongful deaths in territorial waters whether or not it conflicted with state law. *Id.* at 2628. Therefore, the court referred to the general maritime law in determining whether the girl's mother could recover for loss-of-society damages, punitive damages, and funeral expenses. *Id.* at 2639-42.

Likewise, the Texas Supreme Court applied general maritime law to the claims of the parents of a man who was crushed to death between a dock and a boat while

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[5] Under the "saving to suitors" clause of 28 U.S.C. § 1333, the survivors of recreational boaters killed in territorial waters may bring their wrongful death suits in state court even though such suits fall within the scope of admiralty jurisdiction. The state court must, however, apply substantive admiralty law where appropriate. *Tallentire*, 477 U.S. at 222-23; *Moragne*, 398 U.S. at 378 n.1. Consequently, state courts, as well as federal courts, may interpret and apply general maritime principles. Importantly, in determining the appropriate federal rule of decision, state courts are obligated to follow only higher state courts and the United States Supreme Court. Federal appellate and district court precedent may be persuasive, but it is not binding. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam).

helping an elderly shrimp boat captain free his propeller. *See Texaco Refining & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex.), *cert. denied*, 502 U.S. 908 (1991). The decedent was neither a seaman nor a longshoreman, and his parents brought suit under the Texas Wrongful Death and Survivorship Statutes. The Texas Supreme Court held that "[w]here applicable and properly invoked, general maritime law preempts state causes of action and remedies, consistent with the longstanding desire of Congress and the judiciary to achieve uniformity in the exercise of admiralty jurisdiction pursuant to the U.S. Constitution, art. 3, § 2, cl. 1." *Id.* at 64. Finding maritime jurisdiction, the court determined that the trial court had erred by failing to apply maritime law and its limited remedies. *Id.*

## III. THE COURT OF APPEALS' DECISION UPSETS THE UNIFORMITY OF THE GENERAL MARITIME LAW AND CREATES ANOMALOUS RESULTS.

The Court of Appeals' decision deals a clear blow to the uniformity of maritime wrongful death remedies, which this Court most recently reaffirmed in *Miles*. If left to stand, the Court of Appeals' opinion permits (indeed, approves) the application of the wrongful death and survival statutes of each of the fifty states to the deaths of recreational boaters occurring within their territorial waters. The Court of Appeals justifies this disjointed outcome by attempting to downplay the vitality and significance of uniformity in defining maritime wrongful death principles.[6] *See Calhoun*, 40 F.3d at 636.

As discussed earlier, in *Moragne*, this Court stressed the need for a general maritime wrongful death action to

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[6] Curiously, at the same time, the Court of Appeals recognizes the current importance of federal statutes in the evolution of maritime death recovery. *See Calhoun*, 40 F.3d at 636. The role that federal statutes, such as the Jones Act and DOHSA, play in defining general maritime remedies demonstrates, however, the continued importance of uniformity to maritime wrongful death law.

assure the "uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Moragne*, 398 U.S. at 401. The Court of Appeals failed to explain, however, what now justifies a return to the incongruous system this Court rejected in *Moragne* when state law supplied the rule of decision for deaths in territorial waters. Recently, this Court reaffirmed that "the extension of the DOHSA wrongful death action to territorial waters [in *Moragne*] furthers rather than hinders uniformity in the exercise of admiralty jurisdiction." *Miles*, 498 U.S. at 29-30.

The importance of achieving uniformity in maritime wrongful death remedies has remained undiminished since this Court's holding in *Moragne*. In *Miles*, the Supreme Court's most recent encounter with maritime wrongful death law, this Court sought to harmonize the general maritime wrongful death remedy with the remedies provided in the Jones Act and DOHSA. *Miles* emphasized that, in defining the damages recoverable in a general maritime cause of action for the wrongful death of a seaman, this Court acted "in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act." [7] *Id.* at 37. The Court of Appeals both ignores and attempts to circumvent this holding. Moreover, in *Sisson*, this Court observed that "[t]he need for uniform rules of maritime conduct and liability . . . extends at least to . . . activities traditionally undertaken by vessels, commercial or *noncommercial*."

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[7] This Court's decision in *American Dredging Co. v. Miller*, —— U.S. ——, 114 S.Ct. 981 (1994), is not to the contrary. In *American Dredging*, this Court distinguished between the importance of maintaining uniform substantive, as opposed to procedural, maritime rules. *Id.* at 988. In contrast to the doctrine of *forum non conveniens* addressed in *American Dredging*, the *Moragne* wrongful death action involves substantive maritime law and, thus, demands uniform application.

497 U.S. at 367 (emphasis added). Congress also has indicated the importance of having uniform federal rules govern the safety of recreational boats in the Federal Boat Safety Act. *See* 46 U.S.C. § 4306 (preempting states from establishing or enforcing any safety provisions different from those provided by the Act).

In fact, if this Court chooses not to review the Court of Appeals' decision, a lack of uniformity will result at two different levels. First, the various federal courts will be free to apply either federal or state remedies to wrongful death actions involving recreational boaters killed in territorial waters. In addition, each state court will be equally free to choose between federal and state wrongful death remedies for deaths in their territorial waters.[8] As a result, a plaintiff's recovery will depend primarily on where the death occurs. If the boater is killed in a state in which the state and federal courts apply maritime law to a survivor's wrongful death action, one set of rules will govern. If, on the other hand, the state and federal courts have adopted state laws as the rule of decision, a separate set of rules will apply.

Where the federal courts and state courts in the same state choose to apply different law, inaction by this Court will enable survivors of recreational boaters killed in territorial waters to "shop" between the federal and state fora. Thus, for example, if a state supreme court decides that state wrongful death law should apply to the deaths of recreational boaters killed in the state's territorial waters but the federal court of appeals for the circuit including that state opts to follow maritime law under the same circumstances, the plaintiffs will have the choice of filing suit in whichever court promises greater recovery. The confusion and lack of uniformity that such a scenario will likely produce argues strongly in favor of the Court granting certiorari in this case.

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[8] As discussed above, the state courts have concurrent jurisdiction and must follow only the supreme court for the state in which they sit and the United States Supreme Court.

Further, permitting the Court of Appeals' decision to stand, or affirming its holding, will foster anomalous situations akin to those this Court addressed and sought to remedy in *Moragne*. First, the Court of Appeals' ruling results in the application of state law to deaths of recreational boaters in territorial waters but federal maritime law, in the form of DOHSA and the general maritime law, to such deaths on the high seas. Second, under the Court of Appeals' holding, if a boater dies in territorial waters, state law governs his or her survivors' wrongful death and survival actions. If, on the other hand, the boater is merely injured in territorial waters, the general maritime law controls the boater's recovery for his or her injuries. *Cf. Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) (applying general maritime law to determine damages available to injured passenger in suit against cruise line), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 196 (1995); *Mink v. Genmar Inds., Inc.*, 29 F.3d 1543 (11th Cir. 1994) (applying maritime statute of limitations to suit by injured passenger of pleasure boat against manufacturer); *Sinclair*, 935 F.2d at 603 ("The standards defining the duty of care owed to passengers [recreational scuba divers on a commercial dive boat] relate to a traditional goal of admiralty law, the provision of a uniform body of law to provide remedy for those injured while traveling on navigable waters.").

Finally, under the Court of Appeals' holding, the survivors of recreational boaters killed in territorial waters are entitled to recover under the applicable state wrongful death and survival statutes. In contrast, survivors of a seaman who dies in territorial waters may recover only under the Jones Act and general maritime law. Likewise, survivors of a longshoreman who dies in territorial waters may recover only compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, and under the general maritime law. The remedies available to the survivors of seamen and longshoremen under the applicable statutes and general mari-

time law may often be more limited than those under the state acts.[9]

The Court of Appeals rationalizes this incongruity by reasoning that often in maritime personal injury and death cases the status of the injured party determines the available remedies. *Calhoun*, 40 F.3d at 643-44. Traditionally, however, courts have showed a special solicitude to the members of a vessel's crew and their families, focusing on status only to protect seamen, above other maritime workers, as wards of the admiralty court. *See, e.g., Miles*, 498 U.S. at 36 (recognizing "that admiralty courts have always shown a special solicitude for the welfare of seamen and their families"); *Moragne*, 398 U.S. at 386-88, 395-96 (creating general maritime wrongful death action, in part, to correct anomalous situation in which longshoremen, but not seamen, had unseaworthiness remedy for deaths within territorial waters); *Chan*, 39 F.3d at 1407 ("We should also, where possible, be guided by the twin aims of maritime law: achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen."). *Wahlstrom*, 4 F.3d at 1092 (refusing to expand the class of beneficiaries of nonseamen who may recover for loss of society following this Court's denial of such recovery to seamen's beneficiaries); *Truehart v. Blandon*, 672 F. Supp. 929, 937 (E.D. La. 1987) ("General maritime law is its most generous to seamen, the wards of admiralty.").

The Court of Appeals' holding turns this ancient principle on its head. Here, the Court of Appeals gives more

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[9] **The Court of Appeals' decision is likely to generate additional confusion in the application of maritime law. What law will apply to a nonseaman, for example, a passenger, who dies aboard a commercial vessel in territorial waters? In addition, what law will apply in a case where a recreational boat and a commercial vessel collide, causing the deaths of recreational boaters as well as members of the crew of the commercial vessel? If the Court of Appeals' decision stands, different law will apply to different causes of action arising from the same casualty. This result contradicts the uniformity of maritime wrongful death remedies this Court sought to promote in *Miles*.**

generous remedies to those whose livelihood in no way involves work on navigable waters. Under the Court of Appeals' holding, the parents of a teenager fatally injured on a jet ski would be entitled to greater recovery than the parents of a crewmember of a commercial vessel who died while working aboard the vessel. In doing so, the Court of Appeals abandons the special solicitude shown by admiralty for seamen and their families by extending greater remedies to those who are killed while playing in territorial waters than those who are killed while working in the same waters.[10]

## CONCLUSION

The National Marine Manufacturers Association respectfully urges this Court to grant the Petition for Writ of Certiorari so as to resolve the conflict among the courts and reestablish a uniform rule consistent with this Court's precedents.

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[10] The NMMA respectfully suggests that should this Court grant certiorari it consider whether the general maritime death action permits recovery of (1) damages for loss of society; (2) damages for lost future earnings; and/or (3) punitive damages, Petitioner's second question presented, so as to end the confusion that has arisen in the lower courts on these issues. *See, e.g., Sutton*, 26 F.3d at 916-17 (not applying *Miles* to general maritime law recoveries for deaths of nonseamen); *Wahlstrom*, 4 F.3d at 1091, 1094 (not applying *Miles* to loss-of-society claims but considering it with respect to claim for punitive damages for death of nonseaman); *Walker*, 995 F.2d at 84 (recognizing that *Miles* may govern nonseamen's general maritime law remedies) (dictum); *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199, 200-03 (W.D. Mich. 1994) (not applying *Miles* to loss-of-society and punitive damages claims for deaths of nonseamen); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 83 (D. Conn. 1993) (applying *Miles* to general maritime survival action for death of nonseaman); *Garner v. Dravo Basic Materials Co.*, 768 F. Supp. 192, 194-95 (S.D. W. Va. 1991) (not applying *Miles* to general maritime wrongful death action for death of nonseaman).

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